

R.D. # 0012-99
Totowa, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

SHER DISTRIBUTING CO., INC.

Employer-Petitioner

and

**LOCAL UNION NO. 560, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO¹**

Union

CASE 22-RM-725

and

**LOCAL 108, RETAIL, WHOLESALE &
DEPARTMENT STORES UNION, AFL-CIO**

Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,² the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹ The name of this Union appears as amended at the hearing.

² Briefs filed by Local 108 and Local 560 were fully considered. No other briefs were filed.

2. Sher Distributing Co., Inc., ("the Employer-Petitioner") is engaged in commerce within the meaning of the Act; and it will effectuate the purposes of the Act to assert jurisdiction herein.³
3. The labor organizations involved claim to represent certain employees of the Employer.⁴
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act for the reasons described *infra*:

All full-time and regular part-time drivers, stockmen, pickers, packers, labeling and ticketing employees employed by the Employer at its Vreeland Avenue, Totowa, New Jersey facility, excluding all office clerical employees, sales employees, forepersons, guards and supervisors as defined by the Act.⁵

The record reveals that the Employer is a New Jersey corporation engaged in the wholesale distribution of books at its three facilities located at: Vreeland Avenue, Totowa, New Jersey; Taft Court,⁶ Totowa, New Jersey; and West Fairfield Road, Fairfield, New Jersey.

³ It is not disputed that the Employer has derived, during the preceding twelve months, gross revenues in excess of \$50,000 from the sale and shipment of its products directly to customers located outside the State of New Jersey. Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act. *Carolina Supplies & Cement Co., 122 NLRB 88 (1959)*.

⁴ The parties stipulated and, I find, that both Unions are labor organizations within the meaning of Section 2(5) of the Act.

⁵ The parties agreed to the unit description which I find is an appropriate unit for the purposes of collective bargaining.

⁶ It appears from the record that 10 Taft Road and Taft Court are used interchangeably.

The two Totowa facilities are distribution facilities where books are sent to the Employer's customers. Employees there receive books from various publishers, place the books upon racks, pick the product from the racks, and ship books to retailers. The Employer processes returns from its customers at its Fairfield facility. Employees there receive the returned books from retailers, process the returns and send them back to the publishers. There is interchange between the Taft Court and Fairfield employees depending on the workflow and whether the Fairfield supervisor is off from work.

Peter Sher, the Vice-President of Operations for the Employer, was the only witness who testified at the hearing. He testified that in May 1998, the Employer started constructing an addition to the Vreeland Avenue facility in order to merge its Taft Court and Fairfield facilities there. Peter Sher further testified that he expects that the 84 employees who have been working at either the Taft Court or Fairfield facilities will transfer to Vreeland Avenue, where there are now 46 employees. The Employer expects that the employees who move into the Vreeland Avenue facility will perform essentially the same functions as performed at their facility of origin.

It is undisputed that the 74 employees who work at the Taft Court facility will be transferred to at the Vreeland Avenue facility by June 15, 1999, and that the 10 employees employed in Fairfield will be transferred to Vreeland Avenue some time during the remainder of 1999. At the time of the hearing, the Employer had already transferred to its Vreeland Avenue facility approximately 15 to 20 employees who had been employed at the other two facilities.

Local 560, International Brotherhood of Teamsters ("Local560") has a collective bargaining agreement with the Employer, effective by its terms from August 18, 1998 to August 17, 2001 covering the 46 employees at the Employer's Vreeland Avenue facility.⁷ Local 108, Retail, Wholesale Department Stores Union ("Local 108") has a contract with an entity named BMP, Inc. effective by its terms from August 1, 1997 through July 31, 2000 covering the 84 employees who work at the Taft Court and Fairfield facilities in one multi-location unit.⁸

The Employer asserts that it is essentially the same entity as BMP, Inc. ("BMP"). Peter Sher testified that the Employer formed BMP, which performs services such as warehousing, billing and administrative services for the Employer. BMP bills the Employer for these services. BMP also employs approximately 1,200 unrepresented service employees in about 37 states who visit and merchandise books to retailers who purchase books distributed by the Employer.

There is a third entity named Direct Distribution Services or "DDS" which, according to Peter Sher, performs labor functions for the Employer at the Taft Court and Fairfield facilities. He further testified that he functions as the chief operating officer for DDS. DDS is the shipper of goods that are transported from the Taft Court facility. The Employer is the shipper of goods transported from Vreeland Avenue. The Employer collects remittances for the Taft Court and Vreeland Avenue facilities. The Employer employs at the Vreeland Avenue

⁷ The unit represented by Local 560 includes all employee drivers, stockmen, pickers and packers.

⁸ The unit represented by Local 108 includes full-time (21 hours or more per week) labeling, ticketing, picking and packing employees.

facility employees who perform billing functions such as accounts receivable and accounts payable.

Ben Sher is the Employer's majority stockholder owning no part of BMP or DDS. Peter Sher and his brother Mitchell Sher are the shareholders of BMP.

The Employer's board of directors includes Ben Sher, his sons, Peter and Mitchell Sher, and an accountant. Peter Sher testified that he, his father, his brother, and their attorney, Stephen A. Ploscowe, Esq. make the management decisions for the Employer on a group basis.

The Sher brothers are also members of the board of directors of BMP, which may, according to Peter Sher, include one other unnamed director. Peter Sher is the Chief Operating Officer of BMP and Mitchell Sher is the Chief Financial Officer. Peter Sher testified that management decisions for BMP are made by himself, his brother, Wayne Rogers and attorney, Stephen A. Ploscowe, Esq., on a consensus basis.

Millie Montez, an employee employed by the Employer heads its personnel department. Montez is also responsible for the personnel functions at Taft Court and for payroll functions at all three facilities.

Wayne Rogers is the manager of the three facilities, with responsibility for the day-to-day operations. His office is located at Taft Court. He is the ultimate decision-maker concerning decisions to discharge employees at the two Totowa and the Fairfield facilities. The Employer expects to move Rogers' office to Vreeland Avenue after it consolidates its facilities. Peter Sher and Montez currently have their offices at the Vreeland Avenue facility.

The Vreeland Avenue facility consists of four departments: production, shipping, receiving and ticketing. Each department has a manager who reports to Wayne Rogers. The Taft Court facility has managers for its departments. There is a manager at Fairfield Avenue. The various managers perform the initial interviews of employees for their department or facility. Wayne Rogers has the final decision on hiring employees. The various managers may decide less serious discipline matters. If a matter requires more serious discipline or termination, then Rogers will become involved.

After consolidation, the Employer expects that Rogers will continue to manage its operations and that Montez will continue to perform personnel and payroll services. The Employer expects to transfer all of its managers to the Vreeland Avenue facility upon consolidation.

It appears that the Employer-Petitioner contends that it is incumbent on the Board to direct an election in these circumstances as soon as possible in order to resolve the uncertainty among employees as to who their collective bargaining representative will be after the completion of the imminent consolidation here.

Local 560 contends that its collective bargaining agreement with the Employer is a bar to an election. In this connection, it asserts that the BMP employees are not employees of the Employer and that they should be treated as an accretion to the unit of employees it currently represents at Vreeland Avenue. The Employer and Local 108 dispute the assertion that there is a contract bar here. Local 108 contends that the Vreeland Avenue employees, represented by Local 560, should be treated as an accretion to its unit as it will represent the predominant majority at the Vreeland Avenue facility upon consolidation.

The Board has held that an accretion is found where a relatively small, related operation is included or added to the coverage of a collective bargaining unit involving a larger group of employees. *Hudson Berlind Corp.*, 203 NLRB 421, 422 (1973), enforced, 494 F. 2d 1200 (2nd Cir. 1974). In *Martin Marietta Co.*, 270 NLRB 821, 822 (1984), the Board stated, "When an employer merges two groups of employees who have been historically represented by different unions, a question concerning representation arises, and the Board will not impose a union by applying its accretion policy where neither group of employees is sufficiently predominant to remove the question concerning overall representation." See also *Massachusetts Electric Company*, 248 NLRB 155, 157 (1980); *Boston Gas Co.*, 221 NLRB 628, 629 (1975) ("*Boston Gas I*"). In these circumstances, a contract executed before the merger covering one of the facilities to be merged will not bar an election in the merged operation. *Martin Marietta Co.*, *supra*; *Massachusetts Electric Company*, *supra*; *Boston Gas I*, *supra*; *General Extrusion Co.*, 121 NLRB 1165, 1167 (1958).

Here, there has been no challenge to the fact of the impending merger, or the number of employees in the two bargaining units. It is not disputed that there are 84 employees represented by Local 108 who will be merged with the 46 employees represented by Local 560, and that the Employer will exclusively employ the employees at the merged operation. Moreover, there is no dispute that when the two groups are merged, Local 108 will represent 65% of the new, combined workforce, and Local 560 will represent 35% of this group. In *Martin Marietta*, *supra*, the Board found a question of representation raised when one of the represented groups to be merged comprised 63% of the merged workforce. In

National Carloading, 167 NLRB 801(1967), the Board found that 62.9% of the merged unit was not adequate to preclude a question concerning representation.

Local 108 points out that in *Boston Gas Co.*, 235 NLRB 1354, 1355 (1978) ("*Boston Gas II*"), the Board found that an accretion occurred when one union represented 69% of the workforce. Nevertheless, the numbers involved in *Martin Marietta* and *National Carloading* are more similar to the facts at hand. I note further that permitting an election to occur when the minority union represents 35% of the employees is consistent with the Board's requirement that a showing of interest of 30% can support an election. Accordingly, I find that there is not here an accretion, but a question concerning representation that should be resolved by an election.

Accordingly, based upon the record as a whole, I find that it is appropriate to direct an election in this matter as a question concerning representation exists as to the representation of employees upon the imminent consolidation of the Employer's facilities at Vreeland Avenue. In order to resolve the uncertainty as to who will represent the employees created by the consolidation of the Employer's operations, I find that an immediate election is appropriate among the approximately 130 employees regardless of where they are currently assigned.⁹

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of

election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed by the Employer and who work at Vreeland Avenue, Taft Court and/or in Fairfield during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Local Union No. 560, International Brotherhood of Teamsters, AFL-CIO; Local 108, Retail, Wholesale & Department Stores Union, AFL-CIO; or neither.**

LIST OF VOTERS

⁹ Having determined that an election should be directed among the employees who will be employed by the Employer, it does not matter and, I need not decide, whether the Employer and BMP are separate entities or a single employer.

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, three (3) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received by the NLRB Region 22, 5th Floor, 20 Washington Place, Newark, New Jersey 07102, on or before June 1, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The Board in Washington must receive this request by June 8, 1999.

Signed at Newark, New Jersey this 25th day of May, 1999.

/s/ William A. Pascarell

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